Nos. 82-1312, 82-1345 and 82-1346

In the Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT, COMPANY AND THE MONTANA POWER COMPANY, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

PACIFIC GAS AND ELECTRIC COMPANY, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Section 15(a) of the Federal Power Act permits the Federal Energy Regulatory Commission, upon the expiration of a license to operate a hydroelectric facility, to "issue a new license to the original licensee * * * or to issue a new license * * * to a new licensee." Section 7(a) of the Act orders the Commission "in issuing licenses to new licensees under section [15] * * * [to] give preference to applications therefor by States and municipalities * * *."

The question presented is whether the statute requires the Commission, in a license renewal proceeding, to give a state or municipal application a preference over the original licensee's renewal application.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Statutes—Continued:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1312

UTAH POWER & LIGHT, COMPANY AND, THE MONTANA POWER COMPANY, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

No. 82-1345

ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

No. 82-1346

PACIFIC GAS AND ELECTRIC COMPANY, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a)[1] is reported at 685 F.2d 1311. The opinions and orders of the Federal Energy Regulatory Commission (Pet. App. 14a-78a, 79a-80a) are reported at 11 F.E.R.C. (CCH) para. 61,337 and 12 F.E.R.C. (CCH) para. 61,179, respectively.

[1] "Pet. App." refers to the appendix to the petition in No. 82-1312.

JURISDICTION

The judgment of the court of appeals (Pet. App. 81a-82a) was entered on September 17, 1982. Petitions for rehearing were denied on November 12, 1982 (Pet. App. 83a-84a). The petitions for a writ of certiorari were filed on February 4, 1983 (in No. 82-1312) and on February 10, 1983 (in Nos. 82-1345 and 82-1346). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Part I of the Federal Power Act (formerly known as the Federal Water Power Act of 1920), 16 U.S.C. (& Supp. V) 791 *et seq.*, are set forth at Pet. App. 101a-117a.

STATEMENT

A. *The Statutory Framework*

In 1920, Congress enacted the Federal Water Power Act, ch. 285, 41 Stat. 1063 *et seq.*, which later became Part I of the Federal Power Act, 16 U.S.C. (& Supp. V) 791 *et seq.* The Act established a comprehensive federal program for licensing hydroelectric projects and created the Federal Power Commission (now the Federal Energy Regulatory Commission) to administer that program.[2]

---

[2]Prior to 1920, hydroelectric projects often had to be specifically authorized by Congress because such projects usually fell within the prohibition, in Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, against obstructions to the navigable capacity of the waterways. The first hydroelectric project constructed on navigable waters was authorized by Congress in 1890. 26 Stat. 454. In 1906, Congress formalized by statute the terms upon which it would grant such franchises. 34 Stat. 386.

In addition, before enactment of the Federal Water Power Act, regulatory authority over hydroelectric projects was dispersed among several different government agencies. The Chief of Engineers and the Secretary of War had authority, under the Rivers and Harbors Act of

The Act empowers the Commission, *inter alia*, to issue licenses for the construction, operation and maintenance of hydroelectric project works on waterways over which Congress has jurisdiction under its authority to regulate interstate and foreign commerce. 16 U.S.C. 797(e). The Act further empowers the Commission to issue preliminary permits to enable a prospective licensee to maintain its priority of application for a license for up to three years while preparing its license application. 16 U.S.C. 797(f) and 798.

Under Section 6 of the Act, 16 U.S.C. 799, licenses "shall be issued for a period not exceeding fifty years." (Most of the licenses the Commission has issued have been for the statutory maximum 50-year period (see Pet. App. 19a).) When an original license expires, the United States has the right to recapture the projects for its own use: Section 14(a) (16 U.S.C. 807(a)) provides that the United States may, upon expiration of the original license, take over and thereafter maintain and operate any hydroelectric project upon payment of the net investment of the licensee in the project plus reasonable severance damages. Because the investment will have been recouped over the life of the project, this amount is likely to be minimal as compared to the project's fair market value. Section 14(a) also reserves the right of the United States and of any state or municipality to take over any project at any time through condemnation proceedings upon payment of just compensation (*i.e.*, fair market value). See Pet. App. 17a-18a.

1899, to regulate hydroelectric projects, primarily to prevent obstructions to navigation, while the Secretary of the Interior was empowered to grant rights-of-way over public lands for the construction of electrical transmission lines. 29 Stat. 120. The Secretary of Agriculture also possessed some authority to regulate hydroelectric projects. 33 Stat. 628. See J. Kerwin, *Federal Water Power Legislation* 105-115 (1926).

The provision at issue here is Section 7(a) of the Act, 16 U.S.C. 800(a). There is no doubt that this section requires the Commission to give a preference to applications by states and municipalities for preliminary permits and for initial licenses where no preliminary permit has been issued, so long as the applications filed by the state and municipal entities are "equally well adapted" to conserve and utilize in the public interest the region's water resources as are competing applications by private entities.[3] When an original license has expired, Section 7(a) provides that, "in issuing licenses to new licensees under section [15] hereof the Commission shall give preference to applications therefor by States and municipalities * * *."[4] Section 15(a), 16 U.S.C. 808(a), provides, in turn, that if, upon expiration of the original license, the United States does not exercise its right of recapture,

> the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing

---

[3]As between other applicants, Section 7(a) generally provides that the Commission may give a preference to the applicant whose plans are "best adapted" to develop, conserve and utilize in the public interest the water resources of the region.

[4]Section 7(a), 16 U.S.C. 800(a), provides:

> In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section [15] hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

> laws and regulations, or to issue a new license under said terms and conditions to a new licensee * * *.

As a condition of issuing a new license to a new licensee, the new licensee must, before taking possession of the project, pay to the original licensee the amount that the United States would be required to pay under the recapture provisions of Section 14(a) (*i.e.*, net investment plus reasonable severance damages).

This case involves the question whether the state and municipal ("public") preference in Section 7(a) of the Act applies in a relicensing proceeding as against an investor-owned ("private") licensee that has applied for a successor license.

B. *The Proceedings Below*

1. In 1979, the Commission determined that it would address the question of statutory construction in a generic declaratory proceeding, rather than deciding it in the context of an adjudicatory relicensing proceeding (Pet. App. 118a-122a). The declaratory proceeding, in which virtually all of the investor-owned non-public licensees participated, resulted in the issuance of Opinion No. 88 (Pet. App. 14a-78a). In Opinion No. 88, the Commission concluded that under Section 7(a) the public preference does operate in license renewal proceedings.

The Commission first examined the statutory language and held that the distinction between "original licensees" and "new licensees" in Section 15(a) could not be carried over into Section 7(a) "because the contexts of usage are different" (Pet. App. 56a). The Commission found that Section 15(a) deals with "predecessor/successor relationships in a context of successive license terms," whereas Section 7(a) deals with the process of "choosing applicants as licensees for the forthcoming license term, whether that is

the initial term or a successor term" (Pet. App. 60a). Accordingly, the Commission concluded, on the basis of "intrinsic evidence within the statute[,] that Section 7(a) 'new licensees' are those who may be chosen (*i.e.*, the applicants) for the new or forthcoming license term, which status has no necessary relationship to the question of whether they are 'new' or successor licensees as between two license terms in the context of Section 15(a)" (Pet. App. 60a-61a).

Turning to the legislative history, the Commission noted that the bill proposed by the administration in 1918 (H.R. 8716, 65th Cong., 2d Sess.) contained no limitation on the Commission's authority to prefer license applications filed by states and municipalities, and that "the municipal preference in Section 7 of the Administration Bill clearly applied to the issuance of all successor licenses" (Pet. App. 62a). In the Commission's view, "the application of the municipal preference to successor licenses became obscured through * * * successive amendments" to Section 7 (Pet. App. 62a). The Commission concluded that, in adding the phrase "and in issuing licenses to new licensees under section 15 hereof," Congress sought "to express the same municipal preference with respect to successor licenses that was in Section 7 silently immediately before its amendment" (Pet. App. 63a).[5]

---

[5]The Commission noted that the Senate Report (S. Rep. No. 180, 66th Cong., 1st Sess. (1919)) "described this amendment as one of a general body of amendments that were 'of a minor character' and made 'more clear and certain the meaning of the House provisions,' " and that "[t]he interpretation * * * that 'new licensees' are any licensees under a successor license, is the *only* interpretation that is consistent with the official explanation" (Pet. App. 63a; emphasis in original).

In addition, the Commission relied on the identical explanation of the legislation as it emerged from conference by O.C. Merrill, the principal Administration spokesman, and by Congressman Lee, a

The Commission denied rehearing in Order No. 88A (Pet. App. 79a-80a). In doing so, however, the Commission cautioned (*id.* at 80a) that

> nothing in either the intrinsic or the extrinsic evidence on the meaning of Section 7(a) is clearly dispositive of the question before the Commission. The Commission has, in Opinion No. 88, attempted to give full effect to the general purpose of Section 7(a), in the context of Part I of the Federal Power Act, and reflected then on the lengthy and occasionally opaque legislative history. Nothing in the most recent arguments persuades us that we should reverse our determination made in Opinion No. 88.

2. The court of appeals affirmed the Commission's order (Pet. App. 1a-13a). It determined that both meanings accorded to the Section 7(a) term "new licensees"—*i.e.*, the broad one adopted by the Commission and the narrower one corresponding to the Section 15(a) distinction between new and original licensees—are reasonable (Pet. App. 9a). The court accordingly concluded that the statutory language "is sufficiently ambiguous to merit resort to legislative history" (*ibid.*). After reviewing the legislative history relied on by the Commission (*id.* at 10a-12a & nn. 7-9), the court concluded that, although much of the material is "weak," it was appropriate in this case to "give great deference to the Commission's interpretation" (*id.* at 12a).

---

member of the conference committee (Pet. App. 44a; Commission's emphasis; see *id.* at 64a):

> In the development of water powers by agencies other than the United States, the bill gives preference to States and municipalities *over any other applicant*, both in the case of new developments and *in case of acquiring properties of another licensee at the end of a license period.*

C. *Events Occurring Since The Decision Of The Court Of Appeals*

Following the filing of the instant petitions for certiorari, the Commission met for the purpose of formulating its recommendation to the Solicitor General concerning the Commission's response to the petitions. We are informed that at this meeting, a majority of the Commissioners, four of whom were appointed after the issuance of Opinion Nos. 88 and 88A, expressed their disagreement with the Commission's earlier position in those orders. At the conclusion of the meeting, the Commission voted to request the Solicitor General to recommend to this Court that the Court grant the petitions for certiorari, vacate the judgment of the court of appeals, and remand the case to that court with instructions to remand to the Commission for further consideration.

DISCUSSION

(a) This case presents a highly significant question of statutory construction concerning the scope of the state and municipal preference on relicensing in Section 7(a) of the Federal Power Act. The original 50-year licenses for many hydroelectric facilities have expired in the recent past or will expire in the near future.[6] The vast majority of projects have not yet undergone relicensing proceedings. The declaratory order under review here purports to determine the question of the scope of the preference on a generic basis, and will be relevant to numerous relicensing proceedings. It is no exaggeration to say that, potentially, billions of dollars are involved.

Moreover, if the issue of statutory construction is not reexamined in this case, there is a serious question whether it can be subjected to further judicial scrutiny in a subsequent case. It is our understanding that virtually all of the

---

[6]Until the Commission issues a new license for these facilities, it will continue to issue annual licenses to the current licensee pursuant to Section 15(a) of the Act.

investor-owned utilities that own and operate federally licensed hydroelectric facilities were parties to this case. Under traditional res judicata principles, if this Court denies certiorari and the court of appeals' judgment affirming the Commission's declaratory order becomes final, these entities may be bound by the Commission's order in any future relicensing proceeding.

Further, we note that the question presented is undeniably a difficult one. When the matter was before it for decision, the Commission acknowledged that it could find nothing in the statute or its history that is "clearly dispositive of the question" (Pet. App. 80a). In its decision affirming the Commission, the court of appeals similarly observed that the statutory language is "ambiguous" (*id.* at 9a) and the legislative history material is "weak" (*id.* at 12a).

(b) This case is further complicated by the fact that the Commission now wishes to reconsider the case, and that a majority of the Commissioners appear to be ready to overrule Opinion Nos. 88 and 88A and adopt the contrary position. The situation created by these new circumstances is especially delicate in view of the fact that the court of appeals, in interpreting the statute as it did, gave "great deference" to the Commission's previous views (Pet. App. 12a).

(c) The Solicitor General believes that, given the importance of the question, the apparent changes in the views of the Commission, and the basis for and nature of the court of appeals' opinion, the petitions for certiorari should not simply be denied. Rather, the court of appeals should itself be given an opportunity to reconsider the case and reevaluate its own decision in the light of these developments. That court is familiar with the case and has already spoken to it; it is in the best position expeditiously to ascertain the current positions of all the parties and then to decide whether it

wishes simply to adhere to its opinion, or whether it wishes either to reexamine the question itself or to remand to the Commission for a new order setting out and explaining the Commission's current views.

The Solicitor General therefore urges the Court to grant the petitions for certiorari, to vacate the judgment of the court of appeals, and to remand the case to that court for such reconsideration as it deems appropriate in light of the intervening circumstances.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to that court for such further proceedings as that court deems appropriate.

Respectfully submitted.

REX E. LEE
Solicitor General

MAY 1983

DOJ-1983-05